No. 106

IN THE

Supreme Court of the United States

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Term, 1956 No. ~~969~~

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 420, AFL, and ALOYSIUS MCHENRY AND JOHN SMALL.

Petitioners

v.

BENNET F. SCHAUFFLER, Regional Director of the Fourth Region of the NATIONAL LABOR RELATIONS BOARD for and on behalf of the NATIONAL LABOR RELATIONS BOARD.

Respondents.

Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 420 AFL, and Aloysius McHenry and John Small, pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the Third Circuit entered in the above entitled case on March 6, 1956.

OPINION BELOW

The Findings of Fact and Conclusions of Law of the District Court (232a-239a) are unreported. The Opinion of the Court of Appeals for the Third Circuit (App. pp. 18-23) is reported at 230 F. 2d 572 (3rd Cir. 1956).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 6, 1956. A timely Petition for Rehearing was denied on April 26, 1956.

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, 28 U. S. C. A., Section 1254(1), with respect to the rendition of a judgment by a court of appeals.

QUESTIONS PRESENTED

1. Was it error for the defendants to be convicted of criminal contempt without the jury trial to which they were entitled?

2. Was it error for the lower court to expand the scope of the temporary injunction, which repeats the language of Section 8(b)(4)(D) of the National Labor Relations Act, to include conduct which does not, and has never been determined to, fall within its prohibitions?

3. Was it error for the lower court to attribute to the defendants a criminal intent not established by proof beyond a reasonable doubt?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

Section 401 of Title 18, U. S. Code (18 U. S. C. A. 401) provides:

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Section 3692 of Title 18, U. S. Code (18 U. S. C. A. 3692) provides:

"In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct or disobedience of any officer of the court in respect to the writs, orders or process of the court."

The National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. A. 151, et seq, provides:

"Sec. 2. When used in this Act—

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employees."

"Sec. 8—

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: . . .

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

"Sec. 10—

"(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of Paragraph (4)(A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is filed or to which it

is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided, further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided, further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains is principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is

appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)."

Rule 23(a) of the Federal Rules of Criminal Procedure provides:

"Cases required to be tried by jury, shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

STATEMENT OF THE CASE

On May 5, 1954, the United States District Court for the Eastern District of Pennsylvania issued a temporary injunction against the defendant union upon petition of the Regional Director of the National Labor Relations Board pursuant to Section 10(1) of the National Labor Relations Act, as amended. This temporary injunction, which was based upon charges of a violation of Section 8(b)(4)(D) of the Act by the defendant union, restrained Local 420 from violating Section 8(b)(4)(D) of the Act. The issuance of this temporary injunction was affirmed by the Court of Appeals for the Third Circuit: *Schauffler v. United Association, Local 420, et al*, 218 F. 2d 476 (3rd Cir. 1955).

The instant proceedings arose out of a Petition for Adjudication in Civil and Criminal Contempt filed by the Regional Director of the National Labor Relations Board (4a-14a). The petition alleged that on five various job sites petitioners had violated the temporary injunction of the lower court by instructing or directing employees to cease work because Frank W. Hake, a rigging contractor, had done the rigging work on the job. These five jobs involved the installation of the air conditioning equipment of Carrier Corporation by the employees of Carrier and in one instance by the employees of William M. Anderson, Inc.

The business manager of petitioner Local 420, A. McHenry, also a petitioner herein, testified that Carrier had violated its collective bargaining agreement with Local 420 in several respects on all of the jobs involved (125a, 129a-131a). Mr. McHenry testified that the conduct of the petitioners, here condemned, was in protest against these contractual violations of the employer and not for any purpose proscribed by the court's order (136a, 153a, 154a). His testimony showed that on many jobs where Carrier had followed the express terms of the collective bargaining agreement no strike or economic action whatsoever occurred (116a).

The Board contended that the collective bargaining agreement had not been violated by the employer involved. However, the record is absolutely devoid of any testimony showing that defendants' object was one other than to protest a violation of the contract. The conduct complained of had ceased long prior to the hearing before the District Court in this matter (75a).

The District Court found the defendants guilty of civil and criminal contempt (212a). On June 15, 1955, sentence on the criminal contempt charge of a fine of $1000.00 against Local 420 and a fine of $200.00 against the individual defendants was imposed. The Court of Appeals affirmed this finding. The defendants now petition this Court for a Writ of Certiorari to review this judgment of the Court of Appeals for the Third Circuit.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the Third Circuit erred:

1. In refusing, as did the District Court, to permit the defendants to have a jury trial to which they were entitled;

2. In expanding the scope of the temporary injunction which repeats the language of Section 8(b)(4)(D)

of the National Labor Relations Act to include conduct which does not, and has never been determined to, fall within its prohibitions; and

3. In attributing to defendants an intent to violate the temporary injunction and a purpose or object to engage in conduct violative of the injunction neither of which are established by proof beyond a reasonable doubt.

ARGUMENT

Reasons for Granting the Writ

1. In denying to defendants a jury trial, the Court of Appeals and the District Court contravened the pertinent federal statutes and the procedural rules governing criminal trials of this nature, all of which make a jury trial mandatory in this type of case.

This Court has held that a prosecution in contempt aiming to punish defendants for a violation of the Court's order is criminal in nature.[1] In the leading case of *Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418, 444 (1911), this Court held that in proceedings for criminal contempt those substantive safeguards customarily associated with criminal trials must be applied.

The Sixth Amendment to the Constitution of the United States provides that in a criminal prosecution "the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The penal laws of the United States make disobedience of the lawful order of a court the crime of contempt punishable by fine or imprisonment, 18 U. S. C. A. 401. Rule 23(a) of the Federal Rules of Civil Procedure requires a jury trial unless waived "in writing

[1] As has been pointed out, the conduct allegedly violative of the court's order had ceased long prior to the hearing in the instant case (75a). Thus the prosecution of defendants could only be punitive in nature.

with the approval of the court and the consent of the government."

Sections 3691 and 3692 of Title 18 of the U. S. Code provide for a jury trial in certain types of cases. Section 3692 states that "in all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ." Defendants were not given the right to a trial by jury in accordance with this section and their right to a trial by jury was never waived "in writing with the approval of the court and the consent of the government" as required by Rule 23(a) of the Federal Rules of Criminal Procedure.

There can hardly be any question that a "labor dispute" was involved in this case within the meaning of Section 2(9) of the National Labor Relations Act. The findings of the District Court disclose that this case involves a dispute as to terms and conditions of employment within the meaning of Section 2(9) of the Act (237a). This is not a case of an alleged contempt of a decree of the Court of Appeals enforcing an order of the National Labor Relations Board to which these sections might not be applicable. Nothing in Section 3692, which was enacted subsequent to the passage of the amendments to the National Labor Relations Act, precludes its application to a "labor dispute" arising under the National Labor Relations Act. Defendants are certainly entitled to a jury trial of this grave offense because:

> "Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases, the value and appropriateness of jury trials have been established by long experience and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be

jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions that before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." *Patton v. United States*, 281 U. S. 276, 312; 50 S. Ct. 253, 263 (1930).

In *Douds v. International Longshoremen's Association*, 224 F. 2d 455 (2nd Cir. 1955), cert. den. 350 U. S. 873, which presented an exactly similar situation of an alleged criminal contempt of a Section 10(1) injunction, the Court of Appeals for the Second Circuit approved the granting of a jury trial to the defendants. This court should grant certiorari to resolve this conflict of authority between the courts of appeals.

2. The Court of Appeals for the Third Circuit was in error in failing to recognize that in order to find the defendants guilty of criminal contempt it must be found by proof beyond a reasonable doubt that they violated Section 8(b)(4)(D) of the Act. In this respect, the Opinion of the Court of Appeals for the Third Circuit again conflicts with several prior determinations of the Court of Appeals for the Second Circuit.

The Court of Appeals for the Third Circuit in the instant case recognized that the temporary injunction, which defendants are accused of violating, is "drawn in terms of Section 8(b)(4)(D) of the Act." Indeed the injunction repeats word for word the language of Section 8(b)(4)(D). Thus, in order to find a violation of the injunction, the court must find a violation of the Act. An essential of such a violation is the specific object proscribed by the injunction and the Act, that of forcing or requiring an employer to assign rigging work to members of another union rather than to members of the defendant union.

In *Douds v. International Longshoremen's Association*, supra, Judge Learned Hand stated:

"Turning then to the text, we are to ask whether it was an 'object' of the 'Independent's' refusal to serve the trucks to force the 'Association' 'to cease doing business with the trucking concerns' or to force 'customers' of 'trucking concerns' to 'cease doing business' with them. It is indeed true that this was one of the probable, nay perhaps inevitable, consequences of the refusal; but the liability imposed by the section is much more limited than the usual liability for a tort, which extends to any damage that the tortfeasor would reasonably have expected to result from his act. All strikes and 'concerted refusals' to work involve some cessation of business; that is the only sanction they can have. When Congress limited the wrong to occasions when the cessation was an 'object' to the conduct, it excluded much indeed that the ordinary law of tort would have included. If it had not done so, it would have made nearly all strikes unlawful. The 'object' of an action is the concluding state of things that the actor seeks to bring about: that which satisfies his aim. Hence it is a term relative to the whole sequence of steps that he proposes; and it does not apply to those that are only intermediate to it. If I wish to enter my house, but can do so only by passing through my garden, my 'object' is to enter the house, and it is not a subsidiary 'object' to pass through the garden. On the other hand, if I find the garden gate locked, and I take out my key, the 'object' of my doing so is to open the gate, though it is still only a step towards entering the house . . ."

"The remaining question is whether if the respondents' conduct was not a violation of the section, it necessarily follows that it was not in disobedience of the order, because we of course agree that the order had to be obeyed, whether it was right or wrong. In the statement of the 'objects' that made the conduct unlawful the order followed the language phrase of

> subsection A: that is, the ban was upon forcing an employer 'to cease doing business with any other person.' It only submitted the names of the Association', the trucking companies and their 'customers'—Presumably shippers. We do not forget the recital that there was 'reasonable cause to believe' that the respondents had violated the section; but that left open what meaning the court ascribed to the words that had been lifted without change from the section. 'Object' and 'doing business' the order did not attempt to define; and, dealing as we are with a criminal prosecution, we must assume that no more was forbidden than the section itself forbade." 224 F. 2d at 459, 460.

See also *Douds v. Local 1250*, 173 F. 2d 764, 770 (2nd Cir. 1949).

Unfortunately, the Court of Appeals in the instant case did not apply that test here. In the instant case, as in the cited case, the injunction did not define the term "object" and did not interpret the exception set forth in its final phrase.[2] Yet the reading of the Opinion of the Court of Appeals will disclose without question that the Court did not follow Judge Hand's standard or his direction that "no more was forbidden than the section itself forbade." Cf. *Winters v. New York*, 333 U. S. 507 (1948); *McFarland v. United States*, 295 F. 648, 650 (7th Cir. 1923).

The Court of Appeals here erred in assuming the existence of the proscribed "object", which the record certainly does not substantiate by proof beyond a reasonable doubt. The testimony establishes without contradiction that defendants' "object" at all times was to protest the breach of their collective bargaining agreement by Carrier Corporation (135a, 136a). This is conclusively proven by

[2] The record discloses without contradiction that the National Labor Relations Board in Case No. 4-RC-1935 certified the defendant union as the collective bargaining representative of the employees of the employers involved in this case (105a, 101a).

the defendants inaction when the contract was abided by and their protest (the subjects of the instant contempt) when the contract was broken (116a, 155a, 156a, 224a-231a).

3. The Court of Appeals erred in attributing to defendants the intent (or mens rea) to commit a deliberate violation of the temporary injunction.

As the Court of Appeals recognizes in its Opinion (App. p. 22), intent is a necessary element in order to establish the existence of criminal contempt. *Wilson v. North Carolina*, 69 U. S. 586, 600 (1898). The intent necessary to a finding of guilt in the instant case is an intent to violate the injunction, i.e., the intent to engage in a strike or concerted work stoppage for the specifically proscribed purpose. If defendants' intent was to protest a breach of the collective bargaining agreement, their conduct cannot have violated the temporary injunction because it was not for the proscribed object.

In order for a finding of defendants' guilt to be sustained, it must be established by proof beyond a reasonable doubt that defendants' intent was to violate the injunction by engaging in conduct for the purpose of forcing an employer to assign work to members of the defendant union and not for the purpose of protesting a breach of contract by Carrier Corporation. If there exists any basis for believing that the defendants acted to protest a breach of contract by Carrier Corporation, then proof of their guilt beyond a reasonable doubt is lacking.

The intent (or mens rea) required to find defendants guilty of criminal contempt is the intent to violate the injunction. In this case it was thus necessary to find that defendants acted with the intent of forcing an employer to assign rigging work to members of the defendant union. The mere fact that defendants may have instructed employees not to work is not enough, although the Opinion

seems to rely on that fact alone.[3] It must be found that defendants took such action for the proscribed purpose in order to provide a basis for a finding of the existence of intent to violate the injunction.

We agree with the court below (App. p. 22), that intent can be established by circumstances. Yet, the court below failed to consider the temporary injunction in the light of the issues present at the time of its entry and the changed circumstances existing at the time of the prosecution in contempt.

In *Terminal Railroad Association, v. U. S.*, 266 U. S. 17, 29 (1924), Mr. Justice Butler said:

> "In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought; and the facts found must constitute a plain violation of the decree so read."

The temporary injunction was issued on May 5, 1954. It was issued, pursuant to Section 10(1) of the Act, upon the basis of a charge filed with the Board. The Regional Director determined that there was reasonable cause to believe the charge was true and sought the injunction in accordance with Section 10(1) of the Act.

However, the circumstances had entirely changed at the time the instant petition for contempt was filed. Local 420 had, by that time, obtained a legal and enforceable collective bargaining agreement which gave it rights which

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[3] Cf. *United States v. Kroger Grocery and Baking Co.*, 163 F. 2d 168, 173 (7th Cir. 1947), where the Court of Appeals for the Sixth Circuit said:

> "In the instant case the court's order did not enjoin the making of sales, but was only directed at sales made in a certain manner, that is, at a price above the ceiling. Of course, defendant purposely made the sales but the very question in issue is whether it purposely made them at prices in excess of the ceiling . . ." (163 F. 2d at p. 173).

it had not had before. In *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL, Local 428, etc.*, 108 NLRB No. 50 (1954), the Board found Local 420 to have violated Section 8(b)(4)(D) because of the alleged illegality of certain contract provisions upon which Local 420 had relied. The temporary injunction was based partially on this decision. These contract provisions had been changed and legalized at the time of the events herein and, as changed, were relied upon by the defendants.

No charges of unfair labor practices against Local 420 have ever been filed with the National Labor Relations Board on the conduct with which the instant case is concerned. The National Labor Relations Board has never had before it either for a determination of "reasonable cause" under Section 10(l) of the Act or for "final adjudication" the instant situation. The avenue was always open for the complaining parties to file charges of unfair labor practices alleging a violation of Section 8(b)(4)(D) with the National Labor Relations Board and for its Regional Director, the original petitioner here, to seek injunctive relief under Section 10(l) of the Act.[4]

The National Labor Relations Board then has never had before it either for a determination of "reasonable cause" under Section 10(l) of the Act or for "final adjudication" the conduct with which the instant case is concerned. If this situation were to come before the Board, there is no guarantee that even it would find this conduct to be a violation of Section 8(b)(4)(D).[5] We say "even"

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[4] Cf. *NLRB v. Reed and Prince Mfg. Co.*, 196 F. 2d 755 (1st Cir. 1952).

[5] See *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 481, 75 S. Ct. 480, 488 (1955), where Mr. Justice Frankfurter, speaking of this section of the Act, said:

> "This is particularly true in a case like this (involving Section 8(b)(4)(D) where the rulings of the Board are not wholly consistent on the meaning of the sections outlawing 'unfair labor practices' and where the area of free 'concerted activities' has not been clearly bounded."

because the Board is not required to find a violation of the Act by proof beyond a reasonable doubt.

The Board has never alleged that a strike to protest a breach of collective bargaining agreement would be a violation of the Act. See *National Association of Broadcast Engineers*, 105 NLRB 355, 364 (1953); *Local 1212, Radio and Television Broadcast Engineers Union*, 114 NLRB No. 209 (1955). Just as enforcement of a contractual preemption of work would thus not violate Section 8(b)(4)(D), so also action by defendants in the enforcement of contractual procedures for the assignment of work would not violate the Act.

The lower court was thus asked in these proceedings in civil and criminal contempt to find, without any original determination by the Board and by proof beyond a reasonable doubt, that defendant violated Section 8(b)(4)(D) of the Act and thus the Order of the Court. The temporary injunction was based on unfair labor practice charges filed because of certain conduct of defendant Local 420 under its allegedly illegal collective bargaining agreement, but the collective bargaining agreement was changed prior to the contempt proceedings and the allegedly illegal clauses were made legal. Local 420 obviously had the right to take the action permitted by its collective bargaining agreement. Defendants' intent to protest a breach of this agreement cannot be equated to an intent to violate the injunction.

Conclusion

This Court has always been alert to the danger of upholding a criminal conviction without a thorough examination of its basis. The Court below refused to consider the propriety of the conduct undertaken by the defendants in accordance with the rights established by their collective bargaining agreement. The court below further refused to consider the clear refutation of any intent on the part of the defendants to violate the temporary injunction. By its action in this regard, the Court of Appeals for the Third

Circuit has rendered completely ineffective defendants' exercise of their contractual rights and has attributed to them a criminal intent nowhere supported by the record.

The deprival of the defendants of a jury trial and the failure of the testimony to establish by proof beyond a reasonable doubt a deliberate violation by the defendants of the order of the court merit this Court's consideration of these problems.

It is respectfully submitted that for the foregoing reasons it is important that this Petition for a Writ of Certiorari be granted and that the order entered by the Court of Appeals for the Third Circuit on March 6, 1956, be reversed.

Respectfully submitted,

CHARLES A. ROTHMAN
LOUIS H. WILDERMAN
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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 11,690, 11,691 and 11,692

BENNET F. SCHAUFFLER, REGIONAL DIRECTOR OF THE FOURTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD.

v.

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 420, AFL; ALOYSIUS McHENRY; JOHN SMALL.

No. 11,690—UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 420, AFL, APPELLANT.

No. 11,691—ALOYSIUS McHENRY, APPELLANT.

No. 11,692—JOHN SMALL, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued February 9, 1956

Before GOODRICH, McLAUGHLIN and KALODNER, *Circuit Judges.*

OPINION OF THE COURT

(Filed March 6, 1956)

By GOODRICH, *Circuit Judge.*

This is an appeal from a judgment for contempt rendered at the instance of the Regional Director on behalf of the National Labor Relations Board against United Association of Journeymen (pipe fitters) and two of the officers of Local 420.[1] The court gave judgment against the union for $1,000 and against the officers for $200 each. Their appeals were combined in one argument and will be disposed of in one opinion.

The basis of the contempt charge was alleged disobedience of an injunction rendered against this union pursuant to the provisions in §10(1) of the National Labor Relations Act, 29 U. S. C. A. §160(1). The propriety of the injunction was upheld by this Court in *Schauffler v. United Association of Journeymen*, 218 F. 2d 476 (1955). The injunction, drawn in terms of §8(b)(4)(D) of the Act, enjoined Local 420 and its agents from future work stoppages or their inducement.

> ". . . where an object thereof is to force or require Frank W. Hake, Day & Zimmerman, Inc., or any other employer or association of employers in the Philadelphia area, to assign the rigging work on any equipment, pipe, or material to employees who are members of respondent, rather than to employees who are members of or represented by Riggers & Machinery Movers Local Union 161, unless said employer or association of employers is failing to conform to an order or certification of the Board determining respondent to be the bargaining representative for the employees performing such rigging work."

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[1] Schauffler v. United Association of Journeymen, — F. S. — (Civil No. 16722, E. D. Pa., April 20, 1955).

We feel no doubt that work stoppages took place in at least five different instances and that this union through its officers induced them and induced them for the purpose of forcing an assignment of work to members of Local 420 as against members of Riggers & Machinery Movers Local 161. The instances have to do with jobs at Smith, Kline & French Laboratories, Lord and Taylor, Allied Stores, Warwick Hotel and Snellenburg's. Not only is the fact of the pressure by Local 420 clearly established but its business manager, Mr. McHenry (one of the defendants here), freely admitted the exertion of such pressure in at least three of the instances just mentioned.

The important part of the case becomes the argument which the defendants have made to show that this conduct did not violate the injunction. The first and probably easiest point to dispose of is that there was no strike or concerted refusal to work. The argument is that in several of the instances complained of only one member of Local 420 refused to go to work on material handled by Riggers under orders from his local. One man cannot make a "concerted refusal", the argument is, and *N. L. R. B. v. International Rice Milling Co.*, 341 U. S. 665 (1951) is cited. But in that case there was one instance involving one man. Here we have at least five cases; in one of them two men were involved and in another at least six. And here, too, we have a cumulative series of instances which explain why only one man was sent to some of these jobs. His employer intelligently did not send a crew until he found out whether any of his employees would be permitted to go to work.

Second, the defendants claim exemption from contempt liability under the "escape clause" of the injunction which excepted from its prohibition the instances where "said employer . . . is failing to conform to an order or certification of the Board determining respondent to be the bargaining representative for the employees performing such rigging work." This, too, is easily disposed of conclusively, we think, by the decision of this Court in *Schauffler v. United Association of Journeymen*, cited

above. The Court points out that the pipe fitters were at no time the certified representatives of employees doing rigging work (page 481). And see also the Labor Board decisions in 108 NLRB 186, 198 (April 9, 1954); 109 NLRB 854, 858 (Aug. 17, 1954); 112 NLRB No. 147 (1955).

A more complicated question is presented by the defendants' argument that they were protecting their rights secured by contract and that such action does not involve contempt. A short answer to the contention might well be that if there were any rights accruing to them out of a contract they came from an agreement made subsequent to the injunction and the proper procedure would have been to ask the court for a modification in view of subsequently arising facts.[2]

We do not need to stop with this rather preemptory answer, however, because there is no substance to the argument based on alleged contracts.[3] First, both the contract and a "memorandum of understanding" referred to, expressly prohibit stoppages over work assignments. Again, Hake, the employer of members of Riggers 161, was the employer authorized to make assignments[4] and there was no contractual right against Hake by Local 420. And third, the rigging contractor, Hake, did what the so-called memorandum of understanding and its reference to memorandum of October 8, 1953, required. Hake made inquiries of the officers of Local 420 concerning the assignment practice

[2] See McComb v. Jacksonville Paper Co., 336 U. S. 187, 192 (1949); 2 HIGH, INJUNCTIONS §§1416, 1417 (4th ed. 1905); 46 HARV. L. REV. 518 (1933); 59 HARV. L. REV. 293 (1945). *Cf.* United States v. Mine Workers, 330 U. S. 258, 293 (1947).

[3] Thus we do not reach the question whether the enforcement of a contractual preemption would be a violation of an injunction couched in the language of 8(b)(4)(D) of the Act. See National Association of Broadcast Engineers, 105 NLRB 355, 364 (1953).

[4] There is testimony indicating that this was made clear during negotiations attended by Mr. McHenry. Although it was subsequently reaffirmed by Local 420's International, we need not decide whether 420 was bound by its parent's act.

in the area and Local 420 gave him no answer whatever.

Finally, the appellants say that they have not intentionally violated the court's injunction and that such intent to defy the authority of the court is an essential element of contempt.

So far as the civil aspect of the contempt charge goes it need give us no trouble. The court's order was violated and that seems to be enough.[5]

We pass, therefore, to the problem of criminal contempt. The district judge regarded this as the very heart of the case. And Mr. McHenry, on direct examination, gave an explanation which could be interpreted as a denial, albeit somewhat equivocal, of an attempt to violate the injunction.

The trial judge made two findings of fact relevant to this point. He found that the respondents have had "notice" of the injunction and "knowledge" of its terms. His last finding of fact was that the respondents have "knowingly and wilfully, and with intent to defy, disobeyed and violated the Order of this Court . . ."[6]

We think there is no difficulty in this case with the intent question, however hard the problem might become if we were out on the borderline. We do not need to resort to fictitious talk about people being presumed to intend the consequences of their acts in order to uphold the judgment here. Intent is a fact and can be proved by circumstances as well as direct statements of one's state of mind.[7] Here is what Wharton has to say on the matter:

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[5] See McComb v. Jacksonville Paper Co., 336 U. S. 187, 191 (1949); 43 COLUM. L. REV. 780, 793 (1943); 48 MICH. L. REV. 860, 861 (1950).

[6] In some cases the necessary intent has been found to be lacking because the defendants had no knowledge of the court order. Wilson v. North Carolina, 169 U. S. 586, 600 (1898); Kelton v. United States, 294 F. 491, 494 (3rd Cir. 1924) *cert. denied*, 264 U. S. 590 (Mar. 17, 1924). Obviously that is not our set of facts.

[7] See United States v. Kemble, 197 F. 2d 316 (3rd Cir. 1952). In this case the intent had to do with that required for conviction on a charge of stealing goods in interstate commerce.

"Where a specific intent constitutes an essential ingredient of the crime charged it must be established beyond a reasonable doubt to warrant a conviction. This may be done by direct or circumstantial evidence. It may be shown by indirect evidence, as well as direct, and may be gathered from all of the facts and circumstances in the case." 2 WHARTON, CRIMINAL EVIDENCE §931, p. 1625 (11th ed. 1935).

We think the attitude of the defendants toward the prohibition of the injunction is well shown by the whole series of incidents with which the discussion in this opinion began. Mr. McHenry said that on the Snellenburg job the employees of Anderson "were instructed not to do any work within the equipment room." On the Smith, Kline & French job he said that "we issued orders that they were not to start the job." The district court in a colloquy with counsel said that "it appears to me your client kept on doing the very thing I attempted to stop with this injunction." A reading of this rather full record in print demonstrates the correctness of what the trial judge thought at the conclusion of the oral testimony. The defendants did go ahead and use their economic power in an effort to put pressure on various contractors to direct work to Local 420 and away from Riggers' Local 161. This continued course of conduct is strong evidence of the intent to violate the court's order, especially where it is found and not denied that the defendants knew of the order at all times material herein. We have here a typical instance of actions speaking louder than words and the actions certainly showed that for purposes of their own the defendants were not going to obey what the court said.

The judgment of the district court will be affirmed.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 106

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 420, AFL, AND ALOYSIUS McHENRY AND JOHN SMALL, PETITIONERS

v.

BENNET F. SCHAUFFLER, REGIONAL DIRECTOR OF THE FOURTH REGION OF THE NATIONAL LABOR RELATIONS BOARD FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 232a–239a) are unreported. The opinion of the Court of Appeals for the Third Circuit (Pet. 19–23) is reported at 230 F. 2d 572.

JURISDICTION

The judgment of the court below was entered on March 6, 1956; rehearing was denied on April 26, 1956. The petition for a writ of certiorari was filed on May 23, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 2–6 of the petition and in Appendix B, *infra*, p. 17.

QUESTIONS PRESENTED

Petitioners were found guilty of civil and criminal contempt, in a trial without a jury, for violating a temporary injunction issued by the district court pursuant to Section 10 (l) of the National Labor Relations Act. The questions presented are:

1. Whether petitioners waived or abandoned any right to a jury trial which they may have had in the criminal contempt proceedings.

2. Whether the district court's findings, approved by the Court of Appeals, that petitioners disobeyed and violated the injunction are supported by the evidence.

STATEMENT

On May 5, 1954, the United States District Court for the Eastern District of Pennsylvania upon a petition of the National Labor Relations Board adjudged petitioners, the United Associa-

tion of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 420, AFL, and two of its representatives, Aloysius McHenry and John Small, guilty of civil and criminal contempt of court, and assessed fines upon them, for disobeying a temporary injunction previously issued by the district court pursuant to the provisions of Section 10 (l) of the National Labor Relations Act, as amended (61 Stat. 136; 29 U. S. C. Secs. 151 *et seq.*), herein called the Act. The injunction was entered by the district court upon findings that petitioner Local 420, in violation of Section 8 (b) (4) (D) of the Act, had caused work stoppages in connection with the installation of an air conditioning system in the Fidelity-Philadelphia Trust Building in Philadelphia, Pennsylvania, in order to force Day & Zimmerman, Inc., the general contractor on the job, or Frank W. Hake, the rigging contractor, to assign the rigging work to members of Local 420 rather than to employees represented by Riggers and Machinery Movers Local Union 161 (herein called Riggers Union), which latter union represents Hake's employees for collective bargaining purposes. The injunction was also based upon findings that petitioner Local 420 had previously engaged in similar work stoppages for the same purpose on various other jobs in the Philadelphia area. The injunction enjoined Local 420 and its agents, pending final disposition of the matter by

the Board, from engaging in or inducing work stoppages,

> * * * where an object thereof is to force or require Frank W. Hake, Day & Zimmerman, Inc., or any other employer or association of employers in the Philadelphia area, to assign the rigging work on any equipment, pipe, or material to employees who are members of [petitioner union] rather than to employees who are members of or represented by Riggers & Machinery Movers Local Union 161, unless said employer or association of employers is failing to conform to an order or certification of the Board determining [petitioner union] to be the bargaining representative for the employees performing such rigging work.

The contempt proceedings were instituted pursuant to a petition (R. 4a–14a) filed by the Regional Director of the Board moving the court below to adjudge petitioners in civil contempt of court because of their noncompliance with this injunction, and requesting the court to institute, *sua sponte*, a prosecution of petitioners for criminal contempt of court because the noncompliance was wilful and intentional. Petitioners answered (R. 12a–21a), denying the allegations of the petition. At the trial before the district court, oral and documentary evidence was received on contested issues. During the course of the hearings, the district court inquired of counsel whether a

jury trial was required by Section 3692 Title 18, United States Code (Tr. 154–155). Counsel for petitioners replied that although one would have been required in contempt proceedings "under the Norris-LaGuardia Act", there "is some question" as to whether the provisions are applicable to contempt proceedings under the National Labor Relations Act (Tr. 155). Counsel for petitioners further stated "We haven't raised the question of a jury trial here" (Tr. 156). The trial then proceeded.[1] The court below at the conclusion of the hearing found petitioners guilty of both civil and criminal contempt, fined Local 420 $1,000 and its two representatives $200 each for the criminal contempt (R. 212a, 214a).

The evidence adduced before the district court in the contempt proceedings established the following facts:

Carrier Corporation (herein called Carrier), a member of Air Conditioning Heating and Plumbing Employers Association (herein called Employers Association), is engaged in the air conditioning, heating and plumbing business in the Philadelphia area, and employs members of Local 420 as pipefitters or steamfitters pursuant to a collective bargaining agreement. Subsequent to

[1] The colloquy between the district judge and petitioners' counsel, which is not contained in the printed record but appears in the typewritten transcript of the record, is reprinted in relevant part as Appendix A to this brief (*infra*, pp. 15–16).

the issuance of the injunction, petitioners caused Local 420's members to refuse to work on five jobs, where Carrier had contracts to install certain air conditioning equipment, in order to compel the assignment of rigging work to Local 420's members rather than to the employees of Hake who are represented by Riggers Union. More specifically:

1. In November 1954, Carrier dispatched two of its regular employees, members of petitioner Local 420, to the Smith, Kline & French Laboratories to start work on its contract (R. 23a). Upon arriving at the job, employee Fulton, pursuant to the requirement of Local 420's by-laws, telephoned petitioner Small, business agent of Local 420, for clearance to work (R. 30a–31a). Small instructed the employees not to start the job and they both returned to Carrier's plant (R. 31a). Upon learning of Small's action, Peabody, Carrier's construction manager, telephoned Small to inquire why the employees had been refused permission to work (R. 26a). Small asked to whom Carrier had given the rigging contract and when Peabody replied Hake, Small declined to discuss the matter on the telephone (*ibid.*). The next day, Peabody sent Local 420 a telegram stating that he was sending the employees back to the job and requesting that they be allowed to work (R. 27a). The following day, the two employees returned to the Smith job but Small

again refused to permit them to work (R. 28a, 31a).

2. On December 2, 1954, Carrier sent one of its employees to Lord & Taylor to commence work on its air conditioning contract (R. 34a). Carrier likewise had subcontracted the rigging on this job to Hake (*ibid.*). As required by Local 420's by-laws, Carrier's employees telephoned petitioner Small for permission to start work (R. 42a). Small, stating that the job "wasn't cleared," told the employee that he could not work on it (*ibid.*). On December 10, 1954, Carrier sent another employee to start the job (R. 40a, 43a). This employee, upon telephoning Local 420 for permission to work, was referred to petitioner McHenry, business manager of Local 420, who likewise stated that the job had not been cleared and could not be worked (R. 43a–44a). Subsequent calls in December 1954 and January 1955 by this employee to McHenry concerning the Lord & Taylor job produced the same answer (R. 44a).

3. In November or December 1954, Carrier sent an employee to Allied Stores to start the pipefitting work (R. 46a, 48a). Carrier had also let the rigging subcontract on that job to Hake (R. 46a). Upon arrival at the job, the employee telephoned Dugan, another business agent of Local 420, reporting that the machinery had been rigged, and was instructed not to work the job (R. 48a).

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4. In February 1955, after Hake had completed the rigging work for Carrier on the Warwick Hotel, Carrier sent an employee to the hotel to resume its work (R. 51a). Upon arrival at the job, the employee telephoned Local 420, reported that all the equipment had been "rigged in," and was instructed not to work (R. 67a–68a, 71a–72a). Carrier's representative, upon being informed of Local 420's refusal to allow resumption of work at the Warwick, telephoned petitioner McHenry and was told that inasmuch as Hake "had rigged the machine," Hake "could pipe it up," and that Local 420's members "were not going to work on it" (R. 52a–53a).

5. After Hake, pursuant to subcontract from Carrier, had done the rigging on certain air conditioning machinery at the Snellenburg Department Store, petitioner Small, on about March 3, 1955, refused to allow Carrier's employees to work on the job, R. 99a, 73a–74a, 76a). About the same time, the shop steward for Local 420 employed on the job by W. M. Anderson Co., the prime contractor (R. 73a), told Anderson's foreman that Local 420's business agent had issued orders that Anderson's employees were not to run pipe to the equipment rigged by Hake (R. 92a–93a); Anderson had 6 or 7 employees on the job (R. 80a). Later, petitioners McHenry and Small visited the job and instructed Anderson's foreman, shop steward, and two other pipefitters, not to run pipe into the room in which

Hake had rigged the equipment until notified by petitioners that they could do so (R. 93a–96a).

Petitioners did not deny that they ordered the employees of Carrier and Anderson not to work on the foregoing jobs (see R. 142a, 145a, 158a). When Carrier protested the work stoppages on the various jobs, petitioner McHenry claimed that the rigging work should be assigned to members of Local 420, and if it were not, "he wasn't going to let his men work on the jobs" (R. 53a). Employees Association sought to intercede with petitioners in behalf of Carrier and was told by McHenry, in effect, that petitioners were going to stop Carrier from subcontracting the rigging work to Hake by refusing to "pipe to any of these jobs rigged by Hake" (R. 102a).

The district court found, on the facts summarized above (R. 208a), that each of the petitioners had "failed and refused to comply with, and * * * violated and disobeyed" the injunction, and that the violation had been "knowingly and wilfully, and with intent to defy," the court's injunction (R. 238a). The court further found that petitioners were guilty of civil and criminal contempt of court, and imposed fines and costs (R. 238a–239a).

The judgments against petitioners were entered on June 20, 1955 (R. 2a). On June 21, 1955, petitioners appealed to the Court of Appeals for the Third Circuit. On appeal petitioners urged as grounds for reversal of the district court's

judgment that the Carrier company was under a collective bargaining contract with Local 420 which obliged Carrier to assign the rigging work to Local 420; that the evidence failed to establish that petitioners had engaged in or induced work stoppages for the object prescribed by the injunction; and finally that the evidence failed to establish any intent to violate the injunction. Petitioners did not complain of the lack of a jury trial. The Court of Appeals affirmed the judgment of the district court. Subsequently, petitioners filed a petition for rehearing in which they urged for the first time that they had erroneously been denied a jury trial by the district court. The Court of Appeals denied the petition without opinion.

ARGUMENT

1. Petitioners assert (Pet. 8–10) that the district court erroneously "denied" them a jury trial to which they claim they were entitled in the criminal contempt proceedings. Petitioners ignore, however, the decisive fact that the district court did not refuse them a jury trial. On the contrary, when the district court inquired whether a jury trial was mandatory in the instant proceedings, counsel for petitioners stated "We haven't raised the question of a jury trial here" (Tr. 154–156; *infra,* pp. 15–16).

Petitioners did not further allude to the matter until after the Court of Appeals affirmed the

judgment of the district court when for the first time they asserted that they were entitled to a jury trial as a matter of right under Section 3692 of Title 18, United States Code. The belated timing of petitioners' complaint in this respect, coupled with the further circumstance that if there was error responsibility for it must be borne by petitioners, argues against further review of this case.[2] We think that petitioners have, in effect, abandoned or waived their claim to a jury trial in substantial conformity with the requirements of Rule 23 (a) of the Federal Rules of Criminal Procedure which provides that cases required to be tried by jury shall be so tried unless the defendant waives such trial in writing with the approval of the court and the consent of the government. Here, petitioners made it explicit on the record in open court that they did not desire a jury trial. Both the court and government counsel, tacitly at least, accepted this waiver and thereafter the trial proceeded on the understanding that petitioners did not desire a jury trial. Thus, it seems to us, the purpose of the rule was sufficiently fulfilled here, and there is no showing that any failure to observe the literal terms of the rule has resulted in surprise or other prejudice to

[2] Cf. *Hormel* v. *Helvering*, 312 U. S. 552, 556; *Johnston* v. *Reily*, 160 F. 2d 249–250 (C. A. D. C.); *Jones* v. *United States*, 179, Fed. 584, 591–592 (C. A. 9); *Frates* v. *Eastman*, 57 F. 2d 522, 523–524 (C. A. 10).

petitioners. Cf. *United States* v. *Mine Workers*, 330 U. S. 258, 297–298.[3]

2. Petitioners also contend (Pet. 10–16) that the record fails to establish beyond a reasonable doubt either that their conduct was violative of the injunction or that they wilfully disobeyed it. Both aspects of the argument rest on the subsidiary contention that petitioners' purpose in ordering the work stoppages was to protest Carrier's breach of an agreement, executed after the injunction issued, which, it is asserted, assigned the rigging work to petitioner Local 420. This issue, essentially factual in nature, was resolved against petitioners by the two courts below and does not warrant further review by this Court. In any event, as the court below pointed out (Pet. 21–22), there is no merit to petitioners' contention. The agreement, as supplemented by a "memorandum of understanding," between Carrier and Local 420 did not assign the rigging work to members of the latter but provided that the contractor doing the rigging before making the assignment of disputed work was to request information from the business agents of the riggers

[3] The premise of petitioners' claim of a right to a jury trial is that 18 U. S. C. 3692 applies to contempt proceedings arising under the National Labor Relations Act. The correctness *vel non* of this premise raises questions which, as noted in the text, were neither timely raised, argued by the parties, nor considered and decided in the two courts below. In these circumstances we do not believe it is necessary to go into those questions in this brief.

and steamfitters unions regarding the "established practice in order to determine the proper trade to which the assignment shall be made." (R. 220a–221a, 148a–149a, 167a). The contract further provided that there would be no stoppages over work assignments (R. 223a). Hake, the contractor responsible for the rigging work in the instant case, sent inquiries concerning assignment of rigging work to the business agents of both Local 420 and the Riggers Union (R. 196a). Petitioners ignored these inquiries (R. 196a, 155a) and in disregard of the contract resorted to work stoppages to compel the assignment of rigging work to Local 420's members instead of the Riggers Union. Thus, there was no breach of agreement by Carrier, as asserted by petitioners, and their reliance on the contract to excuse their disobedience of the injunction is misplaced.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1956.

APPENDIX A

Excerpts from transcript of testimony taken at petitioner's trial before Judge Alan K. Grim on April 12, 1955.

(p. 154) The COURT. Yet the statute, as I remember it, states that in any labor dispute no one can be found guilty of violating an injunction in criminal contempt (p. 155) except by a jury trial. Have you thought of that?

Mr. MARKOWITZ. That is under the Norris-LaGuardia Act, sir. That is true.

The COURT. Does that have any bearing on this case at all?

Mr. MARKOWITZ. Well, I think that is an open question at this stage, Your Honor. I am not prepared to give you a final answer on that. Under the terms of the Norris-LaGuardia Act that is true, and now there is some question as to whether the terms of the Taft-Hartley Act supersede or take that out of the Norris-LaGuardia Act; but I think I would like some opportunity, if necessary, if Your Honor would like to give me opportunity, to research that question further.

The COURT. Well, in view of the fact that you had not raised it yourself I was willing, of course, to say nothing about it on the assumption, if nothing else, that you had waived your right to a jury trial, but I thought at least I had better mention it. I don't know at all. I don't know whether it applies here or not.

Mr. DUNN. May I make a statement with reference to the jury trial, Your Honor?

The COURT. Yes.

Mr. DUNN. In the United Mine Workers (p. 156) case, Your Honor, the United Mine Workers of Mr. Lewis raised for the first time in the Supreme Court of the United States the question of the jury trial, and the Supreme Court found that although they had not waived their right to a jury trial, that, nonetheless, they had been given a fair trial by the court below, and that they didn't have to have a jury trial, and their having waived a jury trial it was too late to bring it up in the Supreme Court of the United States. We haven't raised the question of a jury trial here.

APPENDIX B

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), in addition to those set forth at pp. 2–6 of the petition are as follows:

Section 10 * * *

> (h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115).

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